UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STAR WEST SATELLITE, INC.

and

Cases 19–CA–133107
19–CA–135489
19–CA–144419

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 206,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Ryan Connolly, Esq., for the General Counsel.
David J. Laurent, Esq., (Buchanan Ingersoll Rooney, PC),
Pittsburgh, Pennsylvania and
Jean E. Faure, Esq., (Faure Holden) Great Falls, Montana,
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Boise, Idaho on June 9-10, 2015 and in Bozeman, Montana on June 30 and July 1, 2015. The Union, IBEW Local 206, filed the charges in this matter on July 18, and August 26, 2014 and January 14, 2015. The General Counsel issued the most recent version of the complaint on April 28, 2015.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by unilaterally changing the work schedules of its employees in Nampa, Idaho.[1] More specifically, the General Counsel alleges that Respondent had a practice of guaranteeing certain employees specific days off of work, which it changed in July 2015 without providing the Union notice and an opportunity to bargain.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) in placing employee Tye Thomas on unpaid administrative leave on August 12, 2014 and putting John Davis on unpaid administrative leave on December 12, 2014. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) in putting these two employees on administrative leave and then discharging Thomas on August 22, 2014 and constructively discharging Davis on January 8, 2015.

[1] Nampa is near Boise.

Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by making unilateral changes in employees' working conditions in July 2014. The first change was requiring employees to request non-consecutive days off on separate forms. The second change was requiring 14 days of advance notice of leave even for previously guaranteed days off.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, whose corporate office is in Montana, installs and services satellite television and internet systems under contract with the Dish Network. It operates in Washington, Idaho and Montana and has gross annual revenues in excess of $500,000. Respondent performs services valued at more than $50,000 outside of Montana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Prior Litigation

The Union was certified as the exclusive collective bargaining representative of Respondent's technicians and warehouse employees on December 15, 2011. On May 23, 2012, the Board issued a decision finding that Respondent had been in violation of Section 8(a)(5) and (1) for refusing to bargain with the Union since January 5, 2012. The Board ordered Respondent to bargain with the Union, *Star West Satellite,* 358 NLRB No. 44 (2012). While there has been bargaining, the parties have not agreed to terms of a collective bargaining agreement.

In the summer of 2013, the same parties litigated an unfair labor practice case before Administrative Law Judge Gregory Meyerson. Judge Meyerson issued his decision on November 4, 2013 (JD(SF) -51-13). On December 2, 2013, the Board granted the parties' joint motion to adopt the Judge's Decision and Recommendation to the Board. Thus, the Board adopted Judge Meyerson's findings and conclusions.

Judge Meyerson:

Dismissed a complaint allegation that Respondent made an illegal unilateral change with regard to the use of subcontractors to supplement the in-house work force;

[2] Tr. 34, line 24 should read Laurent, not Connolly. In volume 4 (July 1, 2015) the names of Respondent's counsel Laurent and the General Counsel's attorney Connolly are mixed up throughout the transcript.

Tr. 392, line 25 should read convincing rather than condensing.

Found that Respondent violated Section 8(a)(5) and (1) in unilaterally requiring technicians to wear hard hats and safety glasses, and requiring warehouse employees to wear a back brace;

Found that Respondent violated Section 8(a)(5) and (1) in unilaterally changing employees' pay dates (to a Wednesday, instead of the previous Friday);

Found that Respondent violated Section 8(a)(5) and (1) in unilaterally changing the way remote technicians (those working out of their homes) were compensated for travel from their homes to one of Respondent's offices to attend mandatory meetings or to pick up supplies;

Dismissed an allegation that Respondent violated the Act in making out of town assignments to its Clarkston, Washington office mandatory. Judge Meyerson found that the General Counsel failed to prove that Respondent made such assignments mandatory;

Dismissed allegations that Respondent changed its overtime policies in the Clarkson, Washington office, or any other office;

Found that Respondent violated Section 8(a)(5) and (1) in changing its policy as to the type of work boots employees were required to wear;

Found that Respondent violated Section 8(a)(5) and (1) in implementing a new customer survey policy. This new policy required technicians to call Respondent's dispatch office so that the customer could complete a satisfaction survey before the technician left the customer's premises.

Found that Respondent violated Section 8(a)(5) and (1) in changing its health insurance plan without giving the Union notice and an opportunity to bargain. The new plan had significantly higher deductibles and different out-of-pocket costs.

Found that Respondent violated Section 8(a)(5) and (1) in implementing a more rigid pre-trip process at its Nampa, Idaho facility. The new process did not add tasks but mandated the time period in which these tasks were to be completed.

Dismissed an allegation that Respondent violated Section 8(a)(5) and (1) by changing the work schedule and terminating technician Joseph Severson. Severson, who worked out of Respondent's Helena, Montana office, had been promised that he would not have to work Tuesdays through Thursdays to accommodate his wife's work schedule and take care of his children. At some point Severson agreed to work Tuesdays, so long as he could leave work by 2:00 p.m. Later, Respondent required Severson to work past 2:00 p.m. on Tuesdays. Judge Meyerson found that Respondent had a past practice of requiring flexibility on the part of its technicians and thus did not violate the At by requiring Severson to work past 2:00 on Tuesday. As noted later, Respondent claims this finding is collateral estoppel with regard to some of the issues in the instant case.

Found that Respondent violated Section 8(a)(5) and (1) in unilaterally eliminating its 401(k) plan.

Found that Respondent violated Section 8(a)(5) and (1) in disciplining employees without consulting and negotiating with the Union. The Judge relied on *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012). That decision was rendered invalid by the U.S. Supreme Court due to the composition of the Board at the time it was issued.

Found that Respondent violated Section 8(a)(5) and (1) in briefly instituting a policy at its Kalispell, Montana facility whereby employees were required to work on their days off if told to do so.

Dismissed an allegation that Respondent violated Section 8(a)(5) and (1) by unilaterally reducing its technicians from a four-day work week to a three-day work week. Judge Meyerson (and thus the Board) found this change was consistent with Respondent's past practice, which was to go back and forth between a 3 and 4-day work week depending on its volume of business.

Found that Respondent violated Section 8(a)(5) and (1) by announcing a new policy unilaterally whereby employees would be required to purchase their own straps and locks to immobilize their ladders when not in use. Judge Meyerson noted that the announcement of the new policy violated the Act even though Respondent may not have implemented it.

Found that Respondent violated Section 8(a)(5) and (1) in failing to provide the Union relevant information it requested for 9 months.

The Instant case

Schedule changes at the Nampa, Idaho facility

Prior to July 2014, several technicians at Respondent's Nampa facility had been allowed certain days off due to child custody and/or visitation situations. Timothy Seitz had been allowed Fridays and Saturdays off since he was hired in August 2010. Levi Billman had been allowed Sundays and Mondays off since he was hired in October 2013. Tye Thomas had been allowed Fridays and Saturdays off since 2009.

For several years the work week for Respondent's technicians varied from a 3 to a 4 to a 5 day work week, depending on Respondent's work load. The length of Respondent's work week was dictated by the number of orders for installation/service work Respondent received from the Dish Network. Respondent supplemented its workforce by hiring contract installers/servicemen when the volume of orders from Dish was greater than it could accommodate with its employees. There were a number of contract installers/servicemen who worked for Respondent on a regular basis.

Respondent's work load varies according to the day of week and also the time of year. Saturdays and Sundays are busier than the middle of the week. The run-up to the football season is busier, for example, than the period around the IRS tax filing date of April 15.

On about July 7, 2014, Mike Ward, the office manager at the Nampa facility, announced that technicians would not automatically be exempt from working both weekend days. Respondent did not notify the Union of this change. Several employees, including Billman,

Thomas and Seitz, objected to Ward and then contacted the Union. They and technician Chad Davis went on strike to protest the change on Saturday, July 19, and Sunday, July 20, 2014. The strikers reported to work on Monday, July 21 and were put back on a schedule within 48 hours.[3]

A group of employees met with Derek Bieri, an operations manager, on about August 1. At this meeting several objected to the changes which had not made accommodation for their child care situations. During this meeting Bieri stated that Respondent would try to accommodate the employees' needs when it was able to hire additional technicians. At one point, Bieri told Levi Billman in effect that if he did not like Respondent's policies he could quit.[4]

Respondent rescinded the schedules that required the 4 employees to work both weekend days on August 7, 2014, R. Exh. 5, page 558-7. By that time Billman had resigned. Seitz resigned in November 2014.

Alleged illegal unilateral change regarding time-off requests (complaint paragraphs 9(b) and 12)

In July 2014 Respondent posted a notice that, among other things, stated that all requests for time off had to submitted 14 days in advance and that this requirement applied to time off on days for which the employee had been guaranteed that he or she would not work. Respondent had not applied the 14 day policy to guaranteed days off previously. The notice also stated that employees submitting leave requests for non-consecutive days would have to do so on separate forms.

Suspension and Discharge of Tye Thomas

In early August 2014 work slowed in Nampa and increased at Respondent's Bozeman, Montana facility. Tye Thomas, one of the employees who went on strike on July 19 and 20, volunteered to work temporarily in Bozeman.

Thomas, had worked for Respondent for five years by this time. According to Mike Ward, the business manager in Nampa, in an email sent to operations managers Parker Estes and Mike Escott on August 13, 2014 [after Thomas had been suspended]:

> Tye's work performance in Nampa was quite good. He had good CSAT's, low repairs and very good SHS numbers. He was with the company for many years and knew all our processes and procedures. He often made recommendations for improvements and changes in them. He would always help new Techs when they encountered issues even when he had significant work himself.

[3] The General Counsel does not allege that Respondent violated the Act in failing to put the strikers on the work schedule immediately when they came to Respondent's Nampa shop on July 21.

[4] Bieri said that Billman knew were the door was located.

> Tye did have one significant shortcoming though. He was often overly out spoken and contentious. His opinions although valued were often sarcastic and delivered in an argumentative fashion. He would become difficult to deal with any time he had strongly felt opinions and required management to intercede and redirect him. He required more oversight than most employees in that regard.

R. Exh. 6.

There is no evidence that Respondent's president, Pete Sobrepena, who testified that he made the decision to fire Thomas, saw this email, or that if he did, that he gave it any consideration.

Respondent suspended and then discharged Thomas as the result of events that occurred in Bozeman on August 11 and 12.

Respondent's Bozeman Field Service Manager, Marcus Kunda, testified that he presented Thomas with a diagram entitled Large Truck Configuration on 3 occasions, and directed him to comply with it.[5] That diagram, Jt. Exh. 3, page 16, indicates what equipment should be carried in the truck and how it should be arranged in the storage compartment of the vehicle. Kunda testified that he did this on the morning of August 11, the morning of August 12 and the evening of August 12. Thomas refused to do so on each occasion.[6] Thomas told Kunda at least once that to load his truck as directed would place too much weight on it.[7]

Thomas denies that Kunda spoke to him about the manner of loading the truck until August 12. This is relevant in determining whether Respondent's insistence on Thomas loading his truck as directed, is related to an August 12 conversation about the Union that both Thomas and Kunda testified to. Union Business Manager James Holbrook's email of August 22, Jt. Exh. 3, p. 14, leads me to credit Kunda's testimony that he initially approached Thomas about the loading of his truck on August 11, before Thomas spoke to him about the Union.

Due to the fact that Thomas objected to the weight of the load he was directed to carry, it is evident that the dispute with Kunda was over the amount of supplies Thomas was to carry as well as how they were to be arranged in his truck.

After the conversation of August 11, Thomas went out on his route and was unable to complete a job immediately because he did not have the proper kind of modem.

On the morning of August 12, Thomas asked Kunda what he thought about the Union. After being rebuffed by Kunda, Thomas continued to speak about the Union to other technicians. Thomas testified that during his discussion with Kunda about the Union and related issues,

[5] There is a different diagram for smaller trucks.

[6] Thomas testified that on the evening of August 12, Kunda brought him the diagram and told him that he needed to reconsider his refusal to load his truck in accordance with it, Tr. 116. While Thomas did not testify that he refused, he testified that he responded, "who wants me to do this?" I consider that tantamount to a refusal.

[7] Some of Respondent's technicians drive trucks owned by Respondent; others drive their own trucks and are compensated for doing so. Thomas drove a company truck for a couple of years and then switched to driving his own.

Kunda became very agitated, Tr. 107. Kunda did not specifically deny this. He merely testified that he told Thomas that he did not want to talk about the Union. Given the specificity of Thomas' account compared to that of Kunda, I credit Thomas.

On the evening of August 12, Kunda again directed Thomas to load his truck in accordance with the diagram for a standard load. Thomas again refused. Kunda then reported this to Operational Managers Parker Estes and Mike Escott. Estes and Escott informed Thomas that he should unload Respondent's property from his truck and return to Nampa.[8]

Respondent suspended Thomas for 10 days. Then on August 22, Pete Sobrepena, President and 100% owner of Star West, discharged Thomas for insubordination.[9]

Legal Analysis with regard to Thomas' termination

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[10] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

There is no question that Tye Thomas engaged in Union activity and that Respondent was aware of that activity. I infer animus both on the basis of Thomas' testimony regarding his August 12 conversation with Marcus Kunda and the circumstances of his participation in the July strike at Nampa. Although there is no direct evidence on this point, I infer animus toward Thomas as a result of the strike. The change in schedules was made, I also infer, due to a shortage of available technicians on the weekends. The strike could only have exacerbated this shortage and made it much more difficult for Respondent to fulfill its obligations to Dish on the weekend in question.

[8] Thomas testified that on August 12, his response to Kunda was, "who wants me to do this Parker?" Then Parker Estes appeared from behind some shelves and fired him. Estes testified that he was instructed to send Thomas back to Nampa, nothing more, and that is what he did. I find no reason to credit Thomas' account, as opposed to that of Estes. I find that Estes did not fire Thomas. I credit Pete Sobrepena's testimony that he made the termination decision.

[9] Kunda testified that on the morning of August 12, he asked Thomas to load his truck with the full load carried by other Bozeman technicians for the second time. Thomas refused to do so. Kunda testified that he then called Parker Estes, who was then his superior. He said Estes instructed him to ask Thomas to comply once more time and that if Thomas refused to let him know.

[10] *Flowers Baking Company, Inc.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

Nevertheless, I find that the General Counsel has not met his burden of proving that Thomas' discharge was motivated by Respondent's anti-union animus. I do so because Thomas' refusal to comply with Kunda's directives as to how to load his truck negates any nexus between the company's anti-union animus and Thomas' discharge. Moreover, assuming that the General Counsel made out his initial showing of discrimination, I find that Respondent met its burden of proving its affirmative defense, i.e., that it would have fired Thomas for insubordination even if he had not engaged in protected activities.

Kunda testified that the truck loading requirements in Jt. Exh. 3, page 16, are a corporate wide policy, Tr. 290-295, R. Exh. 10. However, the evidence strongly indicates that this policy was not uniformly enforced throughout the company. Erik Bohn, a field service manager, testified that Cory Clark, the warehouse manager at Nampa, determines what equipment a technician must take each day. Bohn testified further that on several occasions Clark complained that Thomas was refusing to take equipment that was being added to his route. Bohn would then intercede and Thomas would comply with the request. If the Nampa warehouse was strictly following the diagram that Kunda presented to Thomas on August 11 and 12, there would be no need for Clark to make the daily determinations testified to by Bohn.

Thomas' testimony at Tr. 131-32 also indicates that the requirements set forth on the Large Truck diagram were not strictly enforced at Nampa. This testimony, which is uncontradicted is that after having the front end of his truck rebuilt, Thomas refused to load his truck according to those specifications. I infer that management at Nampa did not force him to do so. Thus, I find the diagram and loading requirements set forth in Jt. Exh. 3, page 16 are not uniformly enforced at least not at the Nampa warehouse.

However, there is no evidence that these requirements were not uniformly enforced at the Bozeman warehouse. There is no evidence that Thomas was being treated disparately when Kunda told him he must follow those requirements.[11] Kunda credibly testified that Respondent has legitimate business reasons for making these loading requirements mandatory. Occasionally or even frequently, a technician in the field may be asked to do a service call in addition to those put on his or her schedule in the morning. Having the mandated load will often obviate the need of travelling to get another part, or sending a technician, other than the closest one, to service the new call. Thus, I find that the General Counsel's characterization of what occurred on August 12 as a minor disagreement blown out of proportion, to be unjustified. Thomas was in fact insubordinate in refusing to comply with Kunda's instructions.

Despite the fact that Thomas was insubordinate, there are some troubling aspects to Thomas' termination. The first of these is that Kunda did not warn Thomas of the potential consequences of failing to comply with his instructions. The second is that Pete Sobrepena appears not to have given any consideration to the fact that, according to his business manager at Nampa, Thomas had been an excellent employee for 5 years. Nevertheless, on the basis on the

[11] The General Counsel argues that Respondent's affirmative defense fails because it introduced no evidence that the requirements applied to Thomas were applied to other technicians who drove their own trucks, as opposed to company-owned trucks. The General Counsel also states that this defense fails because Respondent introduced no evidence of comparable discipline. The General Counsel has the burden of proof on these matters reversed. It is his burden to prove disparate treatment, not Respondent's to disprove it, *Superior Container, Inc.,* 276 NLRB 532 (1985).

facts set forth above I cannot conclude that Thomas was discharged due to the Respondent's animus towards his protected activity.[12]

Suspension and Alleged Constructive Discharge of John Davis

Respondent hired John Davis in December 2012. He worked out of his home in Butte, Montana, but was assigned to the Bozeman, Montana warehouse. In mid-2014, Davis began reporting to the management of the Helena warehouse. On about November 1, 2014, Davis sustained an on-the-job injury when he fell in a crawlspace. He was placed on light duty until December 4, 2014.

Davis' testimony about his union activity prior to his suspension strikes me as unexceptional. Two of Respondent's agents who, according to Davis, were aware of his union activity, Multana Al Rubane and Jeff Jones, appear to have left Respondent's employ by December 2014. He testified to an adversarial discussion with Mike Escott, an operations manager, who was still employed by Star West in December 2014. This discussion occurred in 2014 and was about insurance. According to Davis, Escott said something to the effect that Respondent was not a union company and the Union could only request a change in employees' insurance. Although this testimony does not make complete sense on its face, I find that Davis did discuss insurance and the Board's 2013 Order with Escott, who did not testify in this proceeding. The Board Order found that Star West had violated Section 8(a)(5) by unilaterally changing its health insurance plan.

On December 9, 2014, Davis was installing Dish equipment at a private residence in Bozeman. Marcus Kunda, the Bozeman warehouse manager, showed up at his worksite. Kunda did not assume responsibility for the Helena warehouse until December 26.

Davis' account of what transpired and Kunda's account vary greatly. Davis testified that he had finished his job and was preparing the "educate" the customer, which is why he was not wearing safety glasses and a hardhat. He also testified that he had already returned the orange safety cones from the front of the vehicle to the trunk. Kunda testified that the installation was not complete. Moreover, Kunda testified that Davis did not have any safety cones on his truck. Once again, there is no more reason to credit Davis' account than Kunda's. Moreover, photos taken by Kunda and introduced into evidence by Respondent, R. Exh. 15, appear to support Kunda's version of events.

On the basis of his December 9 visit, Kunda wrote Davis up for 1) not wearing his safety glasses and hardhat; 2) not placing safety cones in front of his vehicle and the absence of all the required ladder straps needed to keep his ladders from falling off his truck while moving.

Respondent suspended Davis for 10 days. Carlos Padilla informed Davis of the suspension in person and then drove Davis from the Helena warehouse to his home in Butte. Respondent belatedly notified the Union of the suspension and extended the suspension for an additional 10 days.

[12] I dismiss the Section 8(a)(3) allegation with regard to Thomas' suspension for the same reasons I dismiss he allegation regarding his discharge.

I find that the General Counsel has not established that either the inspection or the suspension was discriminatorily motivated. For one thing, there is no evidence of recent union activity on the part of Davis of which Respondent was aware. For another, Kunda's testimony, that his inspection was done pursuant to direction from Respondent's workers compensation manager, is more plausible. Indeed, Davis testified that Carlos Padilla, while driving him back to Butte on December 12, told him that the inspection was initiated by Mary Meyer, the workers compensation manager.

Alleged Constructive Discharge of John Davis

John Davis returned to work on Wednesday, December 31, 2014. He was reinstated without backpay. Originally, Respondent had indicated that Davis would receive backpay if he was reinstated, but this was not part of the agreement between the Union and Respondent.

Davis also worked January 1-3 (Thursday through Saturday). Davis was not scheduled for work on Sunday, January 4 and Monday, January 5, 2015. On January 6 and 7, Davis called off of work on the grounds that he was ill. On either January 5 or 6, Davis applied for work with a Toyota dealership as an automobile salesman. On January 8, Davis resigned from his employment with Respondent. He began working for the Toyota dealer either on January 9 or Monday, January 12.

Davis and the General Counsel allege that Davis was constructively discharged due to a number of things that occurred just prior and after his return to work:

1) Respondent refused to provide transportation from his home in Butte to the Helena warehouse to pick up a service truck. This was after technician Carlos Padilla offered to drive to Butte and give Davis a ride back to Helena.[13],[14]
2) Respondent omitted a bag of bolts and nuts from the supplies on Davis' truck on December 31. This made it impossible for Davis to install any of satellite dishes he was supposed to. This in some way could affect his performance rating over the long run.[15]
3) Davis was not allowed to speak to any dispatcher other than Theresa Alderman. Davis does not allege that he was mistreated by Ms. Alderman. He objects to the fact that no other dispatcher would take his calls.
4) Respondent assigned him a truck with two missing ladder straps. Failure to have all four ladder straps was one of the reasons Davis was suspended in December.
5) Respondent did not give Davis a company cellphone. Carlos Padilla testified that he gave Davis a cellphone on December 31. [16]
6) On January 6, he was told that he was not covered by the vision insurance plan offered by Respondent. This was ultimately rectified. Respondent offered Davis the

[13] Butte and Helena are about 65 miles apart.

[14] Padilla did not contradict Davis' testimony that he made such an offer.

[15] Respondent did not give Davis any assurance that the omission of the bolts and nuts, which was largely Respondent's fault, would not count against him in any way. This cuts against Respondent's assertion that the omission was inadvertent.

[16] As Respondent points out in its brief, when Davis complained of harassment to Marcus Kunda on January 1, 2015, he did not mention that he had not been issued a cellphone. Thus, I credit Padilla.

choice of having his insurance reinstated back to May 2014 or having his premium refunded. Davis chose the refund. Respondent initially sent Davis a check for $110 made out to James Davis, a different employee. Davis ultimately received the refund.

Legal Analysis regarding the alleged constructive discharge of John Davis

In order to establish a constructive discharge, the General Counsel must show that the burdens imposed on an employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. Second, the General Counsel must establish that those burdens were imposed because of the employee's union activities, *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976).

I find that the General Counsel has not established that Respondent constructively discharged Davis. None of the actions on which the General Counsel relies regarding constructive discharge were prospective—except having to talk to Theresa Alderman whenever he called the dispatching office. This can hardly be considered a burden so difficult or unpleasant that it would force an employee to quit. Respondent's refusal to give Davis a ride from Butte to Helena on December 29, establishes animus towards his union activity. Given the fact that Carlos Padilla drove Davis to Butte and offered to pick him up on December 29, the lack of any alternative explanation for Respondent's refusal to give Davis a ride establishes animus. However, this refusal had no impact on Davis working conditions after December 29.

The same is true with regard to the absence of the nuts and bolts on December 31. Putting aside whether this was deliberate or an honest oversight, there is no reason to infer that Respondent was going to continue to give Davis inadequate resources to do his job.

Likewise, there is no reason to believe that Respondent was going to fail to provide Davis with adequate ladder straps. Similarly, there is no evidence that Respondent would not have given Davis a cellphone if he had demanded one (putting aside Respondent's testimony that Davis was given a cellphone upon his return to work.)[17]

As to mistakes regarding Davis' vision insurance, there is no evidence that Respondent was responsible for it. Moreover, Davis had every reason to believe that the mistake would be corrected, as it was rectified in fact.

In sum I dismiss the complaint allegation that Respondent constructively discharged Davis.[18]

[17] As Respondent points out, Davis in his January 1, 2015 email to Kunda complaining about harassment the day before, did not mention that he was not given a cellphone, Jt. Exh. 4, p. 30.

[18] An employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.,* 227 NLRB 612, 613 (1976). This type of constructive discharge is not relevant to Davis' case.

I dismiss the Section 8(a)(3) allegation with regard to Davis' suspension because there is no evidence on which to conclude that the suspension was motivated by his union activity.

Alleged Section 8(a)(1) statement by Carlos Padilla

Paragraphs 8 and 10 of complaint alleged that Respondent by Carlos Padilla violated Section 8(a)(1) on January 4, 2015, by telling John Davis over the telephone that he needed to find another job because Davis had contacted the Union.

The essence of this complaint item is Davis' testimony at Tr. 238 that sometime after his return to work, Padilla said to him, "John, you know, off the record, you went to the union there's nothing you can do, you're done. You can just get another job." Padilla did not specifically deny the statement attributed to him by Davis, Tr. 437. He testified that he didn't make any statement about Davis' union activities. Without a direct contradiction, I credit Davis. However, I find that the General Counsel did not establish that Padilla was an agent of Respondent when making this statement. Therefore, I dismiss this complaint allegation.

The Agency status of Carlos Padilla[19]

There is no question that for some period of time Carlos Padilla was a statutory agent of Respondent. He was a lead technician and for a period of time was the highest ranking representative of Respondent at the Helena warehouse. Padilla presented John Davis with disciplinary notices, which he signed.

On about December 26, 2014, Marcus Kunda was given oversight responsibility for the Helena warehouse, as well as for Bozeman. Both Kunda and Padilla told John Davis, upon his return to work, that Davis would be reporting to Kunda and not to Padilla.

At Tr. 240, Davis testified that several days prior to December 31, "when Carlos and I talked Carlos said he was no long my point of contact, it was now Marcus." At Tr. 237, Davis testified that Carlos, "told me there wasn't a whole lot that he could do. That they pretty much pulled the reigns (sic) from him, so far as I was concerned." From the context of this testimony, I infer this conversation occurred sometime between December 31 and January 4. Thus, I find that Respondent had made it clear to Davis that Padilla no longer spoke for the company so far as Davis was concerned. Thus, I concluded that Padilla was not an agent of Respondent pursuant to Section 2(13) of the Act, after Davis returned to work on December 31.

Judge Meyerson's decision, as adopted by the Board, is collateral estoppel with regard Respondent's depriving employees of their guaranteed days off.

Were it not for Judge Meyerson's decision, which was adopted by the Board, I would be inclined to find that Respondent violated the Act in reneging on its promise to Seitz, Billman and Thomas that they were guaranteed certain days off due to custody and child care issues. I would find that these promises made several years prior to July 2014, were more specific past practices

[19] I need not analyze whether or not Padilla was or was not a supervisor pursuant to Section 2(11) of the Act prior to December 31, 2014 because that record does not establish that he was a statutory supervisor after that date. *Graham Architectural Products Corp.,* 259 NLRB 1174 (1982), cited by the General Counsel is distinguishable because the individual in question in that case remained a supervisor of some employees, although not the discriminatee. In this case there is no evidence that Padilla was a supervisor or agent with respect to any of Respondent's employees after December 31.

than Respondent's past practice of maintaining maximum flexibility with regard to work days and work hours.[20] However, this is exactly the issue that Judge Meyerson decided with regard to Joseph Severson at Respondent's Helena facility.

Respondent promised Severson that he would not have to work later than 2:00 p.m. on Tuesdays so that he could look after his children when his wife went to work. It later reneged on this promise. Judge Meyerson found that Respondent did not violate the Act in doing so.

Under the collateral estoppel doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Big D Service Co.*, 293 NLRB 322, 323 (1989), citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 5 (1979), and *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015–1016 (6th Cir. 1983). An issue is "necessarily determined," if its adjudication was necessary to support the judgment entered in the prior proceeding. *Marlene Industries*, supra, 712 F.2d at 1015.

The General Counsel argues that Judge Meyerson's decision was limited to the Helena facility. To the contrary, I find it was much broader and stands for the proposition that Respondent had an established corporate past practice of retaining maximum flexibility with regard to scheduling work hours and work days—regardless of what assurances it has given employees in the past.

First of all, the case before Judge Meyerson involved several of Respondent's facilities in several different states. Several issues in the case concerned more than one facility. For example, one issue was whether Respondent had increased its use of subcontractors after the Union was certified. Judge Meyerson's conclusion, that this was not the case, was applicable to all of Respondent's facilities. His decision regarding Respondent's new requirement for hard hats, safety glasses and back braces was also rendered on a corporate wide basis. The same is true for his decision regarding travel pay, Respondent's overtime policy, work boot policy and health insurance.

The only issues that pertained to only one facility was Respondent's decision to impose more stringent time procedures for morning preparation at Nampa and a mandatory on-call policy at Kalispell. The complaint in Judge Meyerson's case only alleged a violation at Nampa with regard to reducing the work week from 4 days to 3. However, he decided the case on the basis on a corporate-wide policy reserving maximum flexibility in changing work schedules.

Regarding Joseph Severson's schedule, Judge Meyerson stated at page 20 of his decision:

> As counsel for the Respondent points out in his post-hearing brief, the technicians who work for the Respondent are aware that the nature of the Respondent's business requires maximum flexibility in scheduling in order to meet the demands of the Dish Network, which varies considerably from day to day. As I have noted earlier in this decision, the

[20] An employer's actual practice, even if it differs from a written policy, becomes a term and condition of employment that cannot be altered without the agreement of the union, *Sunoco,* 349 NLRB 240, 244 (2007).

Respondent is unaware from day to day just how many orders for installation and repair it will receive from the Dish Network. In order to meet this uncertain demand, the Respondent employs subcontractors to fill in any gaps in staffing, and also expects its own technicians to exercise maximum flexibility so as to be able to work the varying number of hours necessary to get the job done. This has been the past practice of the Respondent and its work force, and I have seen no credible, probative evidence that this practice has changed with the onset of union representation.

When Judge Meyerson relied on Respondent's past practice in dismissing the complaint allegation regarding Joseph Severson, it is clear to me that was relying on a corporate-wide practice, not one limited to the Helena facility.

The "new" requirement that non-consecutive leave had to be requested on separate forms

The General Counsel's witnesses testified that they had never been required to request non-consecutive leave days on separate forms until Respondent posted a notice with that requirement on July 7, Jt. Exh. 2, p. 8. The record shows that the General Counsel's witnesses consistently requested non-consecutive days off on separate forms long before July 2014. However, it also shows that on April 30, Tim Seitz requested paid time off for April 27 and 29 on one form and that the request was approved. Thus, I find that although employees generally requested nonconsecutive days off on separate forms they were not required to do so until July 7, 2014.

However, not every unilateral change violates Section 8(a)(5) and (1). The change must be material, substantial, and significant, *Peerless Food Products,* 236 NLRB 161 (1978). I find that the requirement to use separate forms for non-consecutive leave requests does not meet this standard. Therefore, I dismiss the complaint insofar as it alleges that this change violates the Act.

The "new" 14-day notice requirement for leave requests

The General Counsel concedes that Respondent in posting a requirement for 14 days advance notice of a leave request was generally not implementing a change in policy. However, he asserts that it had never been applied to guaranteed days off, such as the weekend days off guaranteed to Seitz, Thomas and Billman. I credit the testimony of these employees on this issue.

Respondent's evidence with respect to the 14-day requirement is unpersuasive. The fact that Tye Thomas on one occasion submitted a request 14 days in advance for a Friday and Saturday, does not rebut the General Counsel's evidence that employees did not have to submit a leave request for 14 days in advance for each guaranteed day off.

I find that the employees were not scheduled on certain days for several years and never had to submit a leave request for those days of the week. By imposing a requirement that employees who were guaranteed certain days off submit a leave request 14 days in advance,

Respondent unilaterally changed the terms and conditions of their employment. I conclude this change violated Section 8(a)(5) and (1).

The "Alan Ritchey" allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in failing to offer the Union prior notice and an affording it an opportunity to bargain with Respondent with respect to the suspensions of Davis and Thomas. These allegations are based on the Board's decision in *Alan Ritchey,* 359 NLRB No. 40 (2012). In that case the Board, for the first time, held that an employer whose employees are represented by a union must bargain with the union before imposing discretionary discipline during the period between a union's certification (or recognition) and the parties' first collective bargaining agreement. *Alan Ritchey* was one of the many decisions invalidated by the U.S. Supreme Court in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014). The decision was held invalid on the grounds that the Board did not have a quorum that was constitutionally appointed.

Respondent suspended Thomas and Davis before notifying the Union.[21] However, this was consistent with an agreement between the Union and Respondent, Jt. Exh. 3, p. 10. The parties agreed prior to August 2014 that Respondent could suspend an employee without pay or benefits and then notify the Union, Tr. 54-57. Then pursuant to their agreement, the parties would negotiate over the terms of the discipline. After November 2014, Respondent stated that if, after discussion with the Union, it was decided that a suspension was improper, the employee would be returned to work with full pay and benefits, R. Exh. 4, p. 651.

I find that the Union, in agreeing to the procedure whereby Respondent was allowed to suspend employees and then negotiate over the appropriate level of discipline, waived its right to notice prior to suspensions. Moreover, the record shows that Respondent had an established past practice going back to at least December 2013 of suspending employees and then negotiating with the Union over the discipline to be imposed, Jt. Exh. 3, pp. 10, 28, 32.

Since I find that the Union waived its right to pre-suspension notice, I need not decide whether the rationale in *Alan* Ritchey should be followed, or applied prospectively in the absence of valid Board decision reaffirming that rationale. Moreover, Respondent did not violate the Act, even under the terms of the *Alan Ritchey* decision. Footnote 20 at page 9 of the Board's slip opinion states as follows:

> An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective-bargain agreements.

[21] Thomas was suspended on August 12. The Union was notified of the suspension on August 14. Davis was suspended for 10 days without pay on December 12, 2014. Respondent notified the Union of the suspension on December 18. In its December 18 email to the Union, Respondent extended the suspension for another ten days to allow sufficient time for discussion. The December 12 suspension notice stated that if Davis was reinstated Respondent would pay him full-back pay, Jt. Exh. 4, p. 11. However, the Union and Respondent negotiated an agreement in which Davis was reinstated without back pay effective on December 29, Jt. Exh. 4, pp. 12, 17, 26.

While Respondent did not negotiate an interim grievance procedure with the Union, I find that it complied with the law even under *Alan Ritchey* whereby it would suspend employees and then provide the Union the opportunity to negotiate over the discipline to be imposed. Thus I find that under any legal standard, Respondent did not violate the Act.

Conclusions of Law

Respondent did not violate the Act in any of the respects alleged in the complaint, except for the imposing a 14 day notice requirement on employees who were assured that they would not be scheduled to work on certain days of the week.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Star West Satellite, Inc. its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the International Brotherhood of Electrical Workers, Local 206, as the exclusive bargaining representative of its technicians and warehouse employees over the terms and conditions of their employment.

(b) Implementing any material, substantial and significant changes in the terms and conditions of employment of these employees without providing the Union advance notice of those changes and an opportunity to bargain with respect to those proposed changes. This includes any changes in Respondent's policies for requesting leave or days off pertaining to days on which employees have been previously assured that they would not be scheduled to work.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Rescind its policy of requiring 14 days' notice for leave/time off for days of the week that employees have previously been assured they would not be scheduled.

(b) Within 14 days after service by the Region, post at its all its facilities copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 11, 2015.

Arthur J. Amchan
Administrative Law Judge

23 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 206. International Brotherhood of Electrical Workers as the exclusive bargaining representative of our installation and service technicians and our warehouse employees.

WE WILL NOT impose new notice requirements for leave or scheduled days off without providing the Union notice and an opportunity to bargain about these proposed changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our policy of requiring 14 days advance notice of any employee's intention to be off of work for any days that an employee has previously been assured that he or she would not be scheduled to work.

STAR WEST SATELLITE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-133107 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.